COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Investigation by the Department of Telecommunications and Energy on its own motion pursuant to G.L. c. 159, §§ 12 and 16 into Verizon New England, Inc. d/b/a Verizon Massachusetts' provision of Special Access Services	DTE 01-34

REPLY BRIEF OF AT&T COMMUNICATIONS OF NEW ENGLAND, INC.

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

Glossary of Acronyms

Term	Definition
ASR	Access Service Request
CATC	Carrier Account Team Center
CDDD	Customer Desired Due Date
CLEC	Competitive Local Exchange Carrier
CNR	Customer Not Ready
CPE	Customer Premises Equipment
EEL	Enhanced Extended Link
FCC	Federal Communications Commission
FOC	Firm Order Commitment
ILEC	Incumbent Local Exchange Carrier
I-Report	Installation Report of trouble in first 30 days
IXC	Interexchange Carrier
LATA	Local Access and Transport Area
MSA	Metropolitan Statistical Area
NYPSC	New York Public Service Commission
PAP	Performance Assurance Plan
POP	Point of Presence
RR	Record Request
UNE	Unbundled Network Element

Short Names for Key Cases and Regulatory Decisions

Short Form	Long Form
Consolidated Arbitrations	*Consolidated Petitions of New England Telephone and Telegraph Company d/b/a NYNEX, Teleport Communications Group, Inc., Brooks Fiber Communications, AT&T Communications of New England, Inc., MCI Communications Company, and Sprint Communications Company, L.P., pursuant to Section 252(b) of the Telecommunications Act of 1996, for arbitration of interconnection agreements between NYNEX and the aforementioned companies*, Massachusetts DTE Dockets D.T.E./D.P.U. 96-73/74, 96-75, 96-80/81, 96-83, 96-94

Short Form	**Long Form**
D.P.U. 89-20	*Investigation by the Department on its own motion into the provision of pay telephone service, including service provided by customer-owned coin-operated telephones*, D.P.U. 89-20 (February 19, 1991).
D.P.U. 90-133	*AT&T Communications of New England, Inc.*, D.P.U. 90-133 (1991)
D.P.U. 94-50	*Petition of New England Telephone and Telegraph Company d/b/a NYNEX for an Alternative Regulatory Plan for the Company's Massachusetts intrastate telecommunications services*, Order, D.P.U. 94-50 (May 12, 1995)
D.P.U. 94-185	*Investigation by the Department of Public Utilities on its own motion into IntraLATA and Local Exchange Competition*, Vote to Open Investigation, D.P.U. 94-185 (January 6, 1995).
D.T.E. 01-31 Phase I Order	*Investigation by the Department of Telecommunications and Energy on its own Motion into the Appropriate Regulatory Plan to Success Price Cap Regulation for Verizon New England, Inc d/b/a Verizon Massachusetts' intrastate retail telecommunications services in the Commonwealth of Massachusetts*, Order, D.T.E. 01-31-Phase I (May 8, 2002)
IntraLATA Competition Order	*Petition of the Attorney General for a Generic Adjudicatory Proceeding Concerning Intrastate Competition by Common Carriers in the Transmission of Intelligence by Electricity, Specifically with Respect to Intra-LATA Competition, and Related Issues,* D.P.U. 1731 (1985)
NYPSC June 15, 2001, Order	*Proceeding on Motion of the Commission to Investigate Methods to Improve and Maintain High Quality Special Services Performance by Verizon New York Inc.*, NYPSC Case 00-C-2051, Opinion and Order Modifying Special Services Guidelines for Verizon New York Inc., Conforming Tariff, and Requiring Additional Performance Reporting (June 15, 2001)
NYPSC December 20, 2001, Order	*Proceeding on Motion of the Commission to Investigate Methods to Improve and Maintain High Quality Special Services Performance by Verizon New York Inc.*, NYPSC Case 00-C-2051, Order Denying Petitions for Rehearing and Clarifying Applicability of Special Services Guidelines (December 20, 2001)
Pricing Flexibility Order	*Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers; Petition of U S West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, FCC 99-206, Fifth Report and Order, 14 FCC Rcd 14221 (1999) ("Pricing Flexibility Order"), *aff'd sub nom., WorldCom, Inc.* v. *FCC*, 238 F.3d 449 (D.C. Cir. 2001).

Short Form	**Long Form**
Supplemental Order Clarification	*Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Supplemental Order Clarification, CC Docket No. 96-98, FCC 00-183 (June 7, 2000)
Supplemental Remand Order	*Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order, FCC 99-370, CC Docket No. 96-98 (Nov. 24, 1999)
1996 Act	Telecommunications Act of 1996

INTRODUCTION AND SUMMARY.

As the vertically integrated provider of special access circuits, Verizon has the incentive to discriminate in the provisioning and maintenance of wholesale special access circuits.[1] Verizon points to no evidence in its initial brief to show that it is acting contrary to this incentive to discriminate. In fact, Verizon's initial brief demonstrates that Verizon is a company without concern about losing its customers to other special access providers. Throughout its initial brief, Verizon – rather than responding to its customers' concerns – denies the complaints of its wholesale carrier customers that Verizon's performance is not adequate and ignores carrier statements that other ILECs offer better quality service at much lower prices. Verizon's response to its wholesale carrier customers is to ask them to ignore their reality and to claim that the special access service Verizon offers is of high quality. Verizon is unconcerned that it may lose obviously unhappy customers. And for good reason: in the vast majority of situations CLECs have nowhere else to go. In short, Verizon's initial brief underscores the dominance Verizon enjoys in the special access market and confirms the lack of any impediment to Verizon acting in accordance with its incentive to discriminate.

Moreover, Verizon fails to support its two reasons why the Department should not regulate Verizon's provisioning of special access circuits to wholesale carriers. First, even though Verizon contends that competition is sufficient to ensure adequate provisioning and maintenance performance, Verizon (a) fails to provide any evidence to explain why the Department should reverse its D.T.E. 01-31 decision that the special access market is not competitive; and (b) fails to explain why Verizon's contractual ability to sustain higher prices

[1] *D.T.E. 01-31 Phase I Order*, at 64.

and lower performance standards than its competitors is not quintessential proof of market power - evidence which the Department did not even have before it in Phase I of D.T.E. 01-31.

Second, in arguing that its performance is not discriminatory, Verizon fails to provide any data to support its bare assertions that the marked disparity between Verizon's wholesale and retail performance data can be explained by supposed differences in the ordering processes of wholesale and retail customers. Verizon's strategy is obvious: toss out process differences, extenuating circumstances, characteristics of a special access circuits, anything it can find, without any claim or evidence that these characteristics affect Verizon's wholesale performance differently than its retail performance, in the hope that the Department will throw its hands in the air and declare a mistrial. The Department should not be misled by such obfuscation. For most of the extenuating circumstances and characteristics to which Verizon points, there is no evidence that they affect wholesale performance to a greater or lesser extent than retail performance. For the few differences that Verizon does establish, simple adjustments can be made to permit an "apples to apples" comparison between wholesale and retail performance. And, after making those adjustments, the marked disparity between Verizon's wholesale and retail performance still stands.

Finally, Verizon's recounting of the litany of ways in which it measures its performance, as discussed extensively in its initial brief, only illustrates the extensive performance data by which Verizon could have supported its case of non-discrimination and which it did not. Verizon's failure to present any of the obviously available data to disprove the evidence of discrimination indicates that the data do not support Verizon's position.

ARGUMENT.

I. VERIZON FAILS TO SUPPORT THE CONTENTION THAT IT IS NOT A DOMINANT CARRIER IN THE SPECIAL ACCESS MARKET AND THAT IT DOES NOT REQUIRE REGULATION TO CONTROL ITS MARKET POWER.

Verizon claims that the Department should not require Verizon to report its special access service results "because of the competitive nature of such services."[2] Verizon bases its claim of competition on two premises: (1) the FCC's pricing flexibility orders; and (2) the availability of alternatives to Verizon's special access facilities in Massachusetts.[3] Neither of these premises supports a finding of competition in the Massachusetts special access market. As explicitly recognized by the FCC, a grant of pricing flexibility is not determinative of non-dominance. Moreover, pure speculation about the investment plans of AT&T and WorldCom does not provide the Department with record evidence upon which to make a finding of sufficient competition to discipline Verizon's provisioning and maintenance performance. Verizon offers no other evidence of competition, nor any evidence in addition to what it already presented in Phase I of D.T.E. 01-31. Thus, Verizon has not provided the Department with any evidence upon which to reverse its D.T.E. 01-31 finding that "Verizon has not adequately supported its claim that the special access market is competitive on a state-wide basis."[4]

A. Verizon Continues to Rely on Inapplicable FCC Pricing Flexibility Orders to Demonstrate "Competition," Failing to Acknowledge the Department's Test for Market Power.

Verizon's failure even to acknowledge, let alone rebut, the clear evidence presented by AT&T demonstrating Verizon's market power, in accordance with the Department's non-

[2] *Verizon Initial Br.*, at 10.

[3] *Verizon Initial Br.*, at 11, 14.

[4] *D.T.E. 01-31 Phase I Order*, at 62.

dominance rulings, shows the baselessness of Verizon's claim of competition. Verizon completely ignores Ms. Halloran's testimony regarding (1) Verizon's exorbitant special access prices when compared with other ILECs and (2) Verizon's ability to raise those prices even after a grant of pricing flexibility.[5] Moreover, Verizon does not even attempt to address the evidence AT&T presented demonstrating that Verizon's competitors in the special access market base their prices on a discount from Verizon's prices,[6] a clear indicator of market power. This unrebutted evidence demonstrates conclusively that Verizon is a dominant provider of special access services and requires Department oversight.

Claiming that FCC pricing flexibility decisions warrant a Department decision that Verizon need not report its special access performance, Verizon ignores explicit FCC statements that Phase II pricing flexibility "is not tantamount to non-dominant treatment" and does "not grant incumbent LECs all the regulatory relief [the FCC] affords non-dominant carriers."[7] Despite the FCC's recognition that pricing flexibility does not require a showing of non-dominance, Verizon still claims that the FCC's collocation-based triggers for pricing flexibility provide adequate evidence of competition in the Massachusetts special access market and, therefore, Verizon need not be regulated as a dominant provider of those services. The Department has rejected such a bright line test to measure competition,[8] a fact which Verizon recognized in Phase I of D.T.E. 01-31. However, Verizon's argument in this docket, that it is

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[5] *See* Ex. ATT-1, *Halloran Direct*, Attachment C; DTE-ATT 1-7 (Halloran) (referencing Attachments B-1 and B-2 to DTE-ATT 1-4); Ex. ATT-2, *Halloran Surrebuttal*, at 21.

[6] DTE-ATT 1-11 (Halloran).

[7] *Pricing Flexibility Order*, ¶ 151, n. 372.

[8] *See D.T.E. 01-31 Phase I Order*, Syllabus, at viii ("A showing of 'sufficient competition' depends on the analysis of three factors: supply elasticity, demand elasticity, and market share.")

appropriate to utilize the FCC's "easily verifiable bright-line test" for pricing flexibility in order to measure competition,[9] directly contradicts Verizon's position in the D.T.E. 01-31 docket. Criticizing AT&T for supposedly relying on a mechanical, bright-line test of market power, Verizon argued in its D.T.E. 01-31 Initial Brief:

> The Department has long recognized that its determination of whether a market is "sufficiently competitive" requires the consideration of a range of factors, including the structure of the market, the ease of competitive entry, the number of competitors, the presence of actual competitive activity and the extent of competitive losses suffered by the incumbent.[10]

The collocation triggers relied upon by the FCC to grant pricing flexibility certainly do not equate to the thorough competition analysis utilized by the Department, and advocated by Verizon in the D.T.E. 01-31 proceeding. Verizon's reliance on the FCC's mechanical collocation test to determine that sufficient competition exists to discipline Verizon's performance in Massachusetts should be rejected as contrary to Department precedent, not to mention contrary to Verizon's own analysis of Department rulings.

Finally, Verizon admits that a grant of pricing flexibility does not signal state-wide competition, but only "demonstrate[s] the competitiveness of special access services in each of the major MSAs in Massachusetts," namely Boston, Worcester and Springfield.[11] Thus, Verizon does not even contend that FCC grant of pricing flexibility means that competition exists throughout the state.

AT&T will not repeat its entire criticism of Verizon's pricing flexibility argument. In addition to the discussion above, AT&T's presentation of the law and facts demonstrating that a

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[9] *Pricing Flexibility Order*, ¶ 78. *See also WorldCom, Inc.* v. *FCC*, 238 F.3d 449, 457 (D.C. Dir. 2001).

[10] *Verizon Initial Brief*, D.T.E. 01-31, at 2-5.

[11] *Verizon Initial Br*., at 14.

grant of pricing flexibility does not equate to a finding of non-dominance can be found in AT&T's Initial Brief at pages 9-12.

B. Verizon's Conclusory Statements About Alternative Special Access Providers Do Not Demonstrate That the Special Access Market Is Competitive.

In addition to its reliance on inapplicable FCC pricing flexibility orders, Verizon claims that the existence of alternative providers of special access indicates that the market is competitive and, therefore, Verizon should not be subject to reporting requirements.[12] Verizon supports this contention by pointing to WorldCom's "admission" that it has provided special access services to three CLECs and has purchased special access connectivity from at least one CLEC in Massachusetts. The fact that two providers of special access service exist in Massachusetts hardly demonstrates that Verizon does not have market power. This limited evidence in no way rebuts Ms. Halloran's testimony that: "in the majority of situations, Verizon is the only source of special access facilities" because "a number of limitations necessitate the use of Verizon's network to reach end-user customers."[13]

Verizon, in fact, recognizes that carriers predominantly rely on Verizon. Verizon, however, claims that carriers "are not *compelled*" to choose Verizon, they do so voluntarily. Yet, as Ms. Halloran explained, AT&T would not voluntarily choose to buy circuits from the one carrier that provides poor performance (and whose lack of any contractual obligations allow for poor performance[14]) and that charges higher prices than alternative carriers. Rather, "AT&T has

[12] *Verizon Initial Br*., at 14.

[13] Ex. ATT-2, *Halloran Surrebuttal*, at 22.

[14] *See* DTE-ATT 1-11. On May 9, 2002, AT&T responded to the Department's information request DTE-ATT 1-11 with evidence that third party providers of special access circuits price their products on the basis of a discount off of whatever price Verizon charges and commit to performance standards that are more stringent than those to

(continued...)

every incentive to self-provision or to order circuits from cheaper and better quality third-party carriers" but cannot because these options are usually not available.[15] Clearly, where better quality and cheaper alternatives are available, any rational carrier would employ those alternatives. For most routes, though, Verizon is the only provider of special access and, therefore, Verizon has no incentive to provide quality special access to its competitor because Verizon has no threat of losing its wholesale carrier customers. In the present situation, Verizon's high market share is a reflection of its market power. Carriers are forced to order circuits from Verizon even though non-Verizon carriers provide better contractual terms for performance and lower prices for special access.

Verizon also claims that WorldCom and AT&T's "ability to construct facilities, as part of their own or an affiliate's network, to self-provision special access services " demonstrates the competitiveness of the special access market.[16] Verizon supports this contention not with record evidence, but with a string of speculations regarding AT&T and WorldCom's business and investment plans. After admitting that carriers face obstacles to building facilities,[17] Verizon states "it *seems incredulous* that a competitive carrier would not find it worthwhile to deploy its

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(continued...)

which Verizon commits. During the hearings on May 30, 2002, Verizon chose not to cross examine Ms. Halloran with regard to that discovery request, or otherwise to seek to impeach it. At the close of hearings, when exhibits were moved into the record, DTE-ATT 1-11 was inadvertently omitted from AT&T's list. On June 13, 2002, AT&T moved for late admission of the response, noting that there had been no prejudice, since Verizon had the discovery response well before the hearings, in accordance with the established schedule. Neither Verizon nor any other party objected to the admission into evidence of DTE-ATT 1-11.

[15] Ex. ATT-2, *Halloran Surrebuttal*, at 23-24.

[16] *Verizon Initial Br.*, at 16.

[17] *Verizon Initial Br.*, at 16.

own facilities…"[18] Similarly, without citation, Verizon states: (1) "the buildings served by…AT&T and WorldCom…are *likely* to represent the majority of special access demand;" (2) "the level of concentration is *likely* to be even higher on a building-by-building basis;" and (3) while Verizon MA has no firsthand knowledge of AT&T and WorldCom's investment plans, it would *seem likely* that they and other CLECs would target their investments" in certain locations.[19] Verizon's speculation about the business and investment plans of AT&T and WorldCom are not evidence upon which to base a finding of competition. Moreover, Verizon's musings completely ignore Ms. Halloran's testimony, the testimony of Anthony Fea and the FCC Declaration of Mr. Fea and William J. Taggart (attached to Ms. Halloran's testimony) explaining the significant physical and financial barriers AT&T faces in the construction of facilities.[20] In any event, the Department has already rejected Verizon's argument that CLECs such as AT&T and WorldCom can "simply" build their own facilities. In D.T.E. 01-31, the Department stated, "Verizon minimizes the capital investment necessary for such an undertaking, and de-emphasizes the economic, technological, and municipal constraints that competitors may face in building the 'last mile' to business customers."[21] Verizon's speculation in this docket provides no evidence to support a reversal of the Department's finding in D.T.E. 01-31.

[18] *Verizon Initial Br.*, at 16.

[19] *Verizon Initial Br.*, at 17 (emphasis added).

[20] Mr. Fea's Testimony in D.T.E. 01-31 and the Fea/Taggart Declaration were attached to Ms. Halloran's direct testimony. *See* Ex. ATT-1, *Halloran Direct*, at 4, n.3.

[21] *D.T.E. 01-31 Phase I Order*, at 34.

II. VERIZON FAILS TO PRESENT ANY EVIDENCE THAT IT IS ACTING CONTRARY TO ITS INCENTIVE TO DISCRIMINATE AGAINST WHOLESALE CARRIER CUSTOMERS.

Verizon's attempt to distract the Department from the clear discrimination demonstrated by Ms. Halloran's calculations demonstrates the weakness of Verizon's case. First, Verizon makes no effort to provide data showing that, after correcting for its alleged process differences, no discrimination exists. Verizon, however, shows consistently throughout its initial brief that Verizon in fact does have the ability to collect and analyze such data. For example, in carefully choosing its words in order to explain why a wholesale/retail comparison cannot be performed, Verizon reveals that it has the wherewithal to derive corresponding application dates for wholesale and retail. Verizon states:

> Ideally, one would find a time-stamped date earlier in the processes used for end user [sic]. Verizon's existing system design does not, however, *routinely* capture such a time-stamped date in an *integrated mechanized fashion* for all end-user orders.[22]

Verizon's careful crafting of its language certainly indicates that some or all of this information is available, but Verizon chose not to provide it.

In addition to the fact that Verizon fails to present any evidence of non-discrimination, Verizon conspicuously fails to address the evidence of discrimination presented by AT&T. For example, in its attempt to respond to WorldCom's real-world evidence of Verizon discrimination against Bloomberg Financial Services, Verizon simply claims that this "declaration has no bearing on the case in Massachusetts."[23] Verizon does not even acknowledge the Woburn, Massachusetts, incident that AT&T presented as practical evidence of Verizon's discriminatory

[22] *Verizon Initial Br.*, at 40 (emphasis added).

[23] *Verizon Initial Br.*, at 48.

practices.[24] Similarly, Verizon does not recognize or attempt to rebut AT&T's evidence that Verizon's commitment to performance is lower than the contractual commitment of third party suppliers.[25]

AT&T will not repeat its detailed analysis at pages 19-27 of its Initial Brief as to why Verizon's claimed process differences do not invalidate the data showing discriminatory on-time performance and intervals. AT&T, however, does address below the Verizon arguments not discussed in AT&T's Initial Brief.

A. Verizon's Claimed "Extenuating Circumstances" Do Not Invalidate the Discrimination Demonstrated by Verizon's Performance Data.

Verizon claims that two "extenuating circumstances" account for Verizon's poor on-time performance to wholesale carrier customers in 2000 and 2001: (1) a sudden increase in the special access orders during the latter half of 1999 into 2000; and (2) a labor strike in August 2000.[26] Verizon states that these extenuating circumstances prohibit the Department from relying on 2000 and 2001 data to find that Verizon discriminated against wholesale carrier customers and Verizon, therefore, requires regular reporting. Contrary to Verizon's claims, however, Verizon's citation of these extenuating circumstances only confirms the existence of discrimination by Verizon and further demonstrates the need for regular reporting by Verizon.

First, Verizon specifically states that the backlog created by these two extenuating circumstances "impacted *all* of Verizon's customers (*whether end users or carriers*)."[27] By this

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[24] *See* Ex. ATT-2, *Halloran Surrebuttal*, at 12-13 (citing VZ-ATT 2-4).

[25] DTE-ATT 1-1 (Halloran) (contains proprietary information).

[26] *Verizon Initial Br.*, at 8, n. 7; 24.

[27] *Verizon Initial Br.*, at 25 (emphasis added).

statement Verizon admits its discrimination against wholesale carrier customers. For 2001, Verizon's on-time performance to its retail customers was a consistent 98-99 percent; while Verizon's on-time performance to wholesale carrier customers averaged around 84 percent for the year.[28] Thus, to the extent that the 1999-2000 surge in special access orders and the August 2000 labor strike had any effect on year 2001 data, which Verizon has not demonstrated, the 2001 data shows that the extenuating circumstances only adversely affected Verizon's performance to wholesale carrier customers, not its performance to retail customers.

Verizon's extenuating circumstances argument shows the robustness of Verizon's discrimination. Even when extenuating circumstances affected Verizon's provisioning of both retail and wholesale orders, Verizon's retail customers received substantially better on-time performance than wholesale carrier customers. This systemic discrimination continues even when extenuating circumstances are not allegedly affecting service quality. For the first quarter of 2002, when Verizon's wholesale on-time performance improved to 92-94 percent, Verizon's retail on-time performance improved to 100 percent.[29] Thus, no matter what the conditions, Verizon provides more timely service to its retail customers than its wholesale carrier customers.

Second, Verizon's ability to excuse its performance for any particular, limited period of time by citing some extenuating event or events that occurred during that time period only further demonstrates the need for ongoing and regular reporting. Verizon will always be able to point to some unique event within a limited reporting period in order to excuse poor performance. Methodical and consistent monitoring of Verizon's performance by the

[28] Ex. ATT-2, *Halloran Surrebuttal*, at 13.

[29] Ex. ATT-2, *Halloran Surrebuttal*, at 13 (with updates provided at Tr. 369-371, 5/30/02 (Halloran)).

Department will prohibit such a practice. Moreover, mandated reporting will allow the Department to test Verizon's claim that the 2000 and 2001 data results are in fact "anomalous" because of alleged extenuating circumstances.

B. Verizon Does Not Allege That the Special Access Characteristics Listed in DTE-VZ 5-31 Have an Adverse Effect on Wholesale Performance Different From Their Effect on Retail Performance; These Characteristics, Therefore, Do Not Explain the Discriminatory Results.

Verizon points to a string of characteristics exhibited by special access circuits in support of its claim that that special access services provided to wholesale customers are not "like" the services Verizon provides to its retail customers.[30] Among the characteristics of special access orders, Verizon cites "product mix," complexity, location, supplemental changes, projects, and CNR. Verizon, however, makes no showing, nor even claims, that these characteristics affect Verizon's wholesale performance any differently than they affect Verizon's retail performance. Thus, these characteristics do not justify better performance for retail customers than wholesale carrier customers.

Because Verizon predominantly provides DS0 circuits to its end-user customers and primarily provides DS1 circuits to its wholesale carrier customers, Verizon claims that this variation in the product mix between retail and wholesale "affects measured performance."[31] Verizon's argument is nonsensical given that AT&T's analysis of Verizon's on-time performance is disaggregated by circuit level. AT&T compares Verizon's provisioning of DS1 circuits to retail customers versus its provisioning of DS1 circuits to wholesale carrier customers. The fact that retail customers order more DS0s than DS1s therefore does not affect AT&T's on-

[30] *Verizon Initial Br.*, at 29, 34, 42-43.

[31] *Verizon Initial Br.*, at 29.

time performance calculations for DS1 circuits. Retail customers ordered a substantial number of DS1s – 15,371 – for the 15 month period for which Verizon provided data.[32] Wholesale carrier customers ordered 23,964 DS1 circuits for that same time period.[33] Thus, a substantial number of retail DS1 circuits was compared to wholesale DS1 circuits. Verizon's claim that "product mix" is different for retail and wholesale customers in no way accounts for Verizon's discriminatory provisioning results for DS1 circuits.

Verizon also alleges that the complexity of specific special access orders prevents comparison of wholesale and retail data;[34] yet, Verizon never demonstrates that complex orders require more time to provision or that circuits ordered by wholesale carriers customers are more complex than those ordered by retail customers. Without such evidence, there is no proof that the complexity of orders has any more adverse affect on Verizon's provisioning to wholesale carrier customers versus retail customers. Moreover, record evidence shows that orders for which no facilities are available, which one would assume are more "complex," do not have a lower on-time performance rate than orders for which facilities are available.[35]

Verizon claims that circuits ordered as part of an overall project prevent comparison of wholesale and retail.[36] In order to show the alleged impact of projects, Verizon could have separated out the circuits ordered as part of a project by using the project ID.[37] Again, Verizon

[32] WCOM/ATT-VZ 1-3 (updated in DTE-VZ 1-5) (grand total of non-access intrastate DS1 circuits).

[33] WCOM/ATT-VZ 1-3 (updated in DTE-VZ 1-5) (grand total of interstate and intrastate non-affiliate DS1 circuits or 23,897 + 67 = 23,964).

[34] *Verizon Initial Br.*, at 42.

[35] *See* Ex. ATT-8, Comparison of on-time percentage, facilities builds included v. facilities builds omitted.

[36] *Verizon Initial Br.*, at 43.

[37] Tr. 430-431, 5/30/02 (Halloran).

failed to offer any such data and, therefore, any proof that projects affect Verizon's wholesale performance more than its retail performance.

Verizon also claims that supplemental change or numerous supplemental changes to an order after Verizon begins processing the request for service affects Verizon's provisioning results.[38] As with Verizon's references to product mix and complexity, "supps" do not have a differential effect on wholesale versus retail. First, as admitted by Verizon, a wholesale carrier customer that "supps" an order restarts the interval, thus eliminating all previous time from the interval.[39] As such, the wholesale interval is not lengthened by a "supp," and therefore does not lengthen the wholesale interval. Second, the time prior to a "supp" by a retail customer is not included in the retail interval because Verizon's application date does not occur until Verizon enters the Service Order in its system.[40]

Verizon also attempts to justify the discriminatory provisioning results by pointing to the fact that "carrier customers often will request a due date consistent with the minimum provisioning intervals referred to in Verizon MA's tariff…[or they] may indicate longer intervals in accordance with the individual customer's needs."[41] Such a statement, however does not explain why wholesale intervals are systematically longer than retail. Retail customers have the same option of requesting shorter or longer intervals depending on their requirements. More importantly, Verizon's on-time performance and intervals offered and completed are measured by the *committed* due date as determined by Verizon, not the customer's desired due date.

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[38] *Verizon Initial Br.*, at 42.

[39] *Verizon Initial Br.*, at 39.

[40] *Verizon Initial Br.*, at 39.

[41] *Verizon Initial Br.*, at 34, n. 32.

Therefore, the due date a wholesale or retail customer requests has no bearing on Verizon's discriminatory on-time and interval performance results as presented by AT&T. Verizon provided no data in the proceeding to demonstrate that the customer's requested intervals have any impact on the plain disparity in results. Verizon could have provided data to show results based on requested intervals but did not choose to do so.

As AT&T points out in its initial brief, the remaining characteristics of special access circuits listed by Verizon in DTE-VZ 5-31, and on pages 42-43 of Verizon's initial brief, apply equally to wholesale and retail special access circuits. Verizon has offered no evidence to show that these characteristics differ between wholesale and retail, thereby justifying Verizon's discriminatory performance.

C. Wholesale Access Data Should Be Compared To Retail Non-Access Data in Order to Make a Pure Comparison of Wholesale to Retail.

Verizon claims that use of only non-access retail data unfairly skews AT&T's calculations showing discrimination.[42] However, just the opposite is true – exclusion of the access data prevents arbitrarily low retail, on-time performance results. As recognized by Verizon, "[n]on-access special services include a different mix of products and service characteristics from special access services."[43] The retail access data reflect circuits ordered from Verizon by an end-user customer to connect to an IXC POP.[44] These circuits are ordered under the appropriate wholesale tariff, D.T.E. 15 or FCC 11,[45] and are provisioned out of the

[42] *Verizon Initial Br*., at 9, n.10.

[43] *Verizon Initial Br*., at 9, n.10.

[44] Tr. 495, 5/30/02 (Halloran).

[45] Tr. 191, 5/29/02 (Holland).

CATC. In other words, the retail end user is ordering the pipe from Verizon, but ordering the service from a competing carrier; and Verizon is provisioning the circuit out of the same organization that it provisions wholesale orders. Verizon has little incentive to provide high quality provisioning and maintenance of these circuits because Verizon is not providing the service, only the pipe. AT&T therefore correctly excluded the access circuits so that a comparison of pure retail, where the carrier is not involved (*i.e.*, "non-access"), could be made to wholesale.[46] Moreover, because the retail access circuits are provisioned out of the CATC and the retail non-access circuits are provisioned out of Verizon's OCO, the comparison of retail non-access to wholesale access allows a clear picture of the different service quality provided by the two Verizon organizations.

Verizon puts great weight on the fact that Ms. Halloran stated at the hearings that retail access and non-access data might be combined in a comparison of retail to wholesale.[47] Verizon, however, ignores a key qualification made by Ms. Halloran at the same time that she speculated on whether retail access and non-access data should be added together: "As that definition of what's access has bounced around these few days – I'll have to read the transcript to see where it ended up – but I believe, if I were to calculate it again, now I might put the two together."[48] As demonstrated above, review of the transcript reveals that Verizon's incentives and ordering process for retail access circuits are more similar to wholesale access circuits than retail non-access circuits. For example, retail access circuits are ordered out of the CATC, not out of the OCO like retail non-access circuits. And Verizon has the same perverse incentive to provide

[46] Tr. 495, 5/30/02 (Halloran).

[47] *Verizon Initial Br.*, at 9, n. 10.

[48] Tr. 495, 5/30/02 (Halloran).

poor performance in the provision and maintenance of retail access circuits because the retail services that ride the circuit are being provided by another carrier. It would not make sense to add retail access data to retail non-access data that reflect Verizon's performance providing the complete package of retail services to its end user customers.

D. Verizon's Claimed Maintenance Process Difference Supports the Need for Regular Reporting.

Verizon's alleged process difference in the maintenance of special access circuits demonstrates that Verizon needs to be subjected to regular and consistent reporting requirements. In order to justify its discriminatory maintenance results, Verizon claims:

> with carrier customers, if Verizon MA has handed-off the circuit as complete and a trouble is found, this would be reflected in the new circuit failure rate. Tr. 269. By contrast, there is a period (*e.g.*, between five and ten days) following a newly installed circuit for an end-user customer when a reported trouble would not be declared a new circuit failure. Tr. 269-70.

Thus, Verizon admits that it is using an inaccurate measurement at retail, perhaps to avoid the impression that it is providing poor service to its retail customers. Whatever the reason, Verizon should not be able to use inaccurate measures for retail as an excuse to prevent a comparison of wholesale and retail provisioning, and thus escape reporting requirements. Such inaccurate internal reporting only further supports the need to require Verizon to report its special access performance pursuant to established and ongoing metrics and standards.

E. Verizon's Dismantling of Its Project ACE Service Initiatives Demonstrates That Verizon Is Unconcerned About Its Service Quality to Wholesale Carrier Customers.

Verizon claims that improvements in Verizon's performance as seen in the first quarter 2002 are not the result of Department scrutiny of Verizon's performance, but rather the result of

"service initiatives implemented in 2001."[49] Verizon, however, admits that it can and has stopped these service initiatives, and that Verizon unilaterally lowered its service quality thresholds for the year 2002. Verizon relegates to a footnote in its brief the fact that Verizon dismantled its Project ACE improvement initiative, supposedly incorporating the performance assurance initiatives from that project into existing Verizon internal service related measurements.[50] Yet, Verizon's witness Ms. McFeeley states in testimony about her wholesale CATC:

> I don't track some of the initiatives in the way that this project was done, because it got absorbed into daily occurrences. So that we wouldn't go down to --This was a very labor-intensive project, to track it this way. We no longer track it that way.[51]

Verizon's description of its Project ACE initiatives on pages 21-23 of its initial brief are irrelevant to Verizon's current improvement plan, if any such plan exists, and offers no proof that Verizon presently is working to improve its performance to wholesale carrier customers. The movement away from service quality initiatives is further demonstrated by Verizon's reduction of the threshold for on-time performance of wholesale orders from 95 percent to 92 percent as part of Verizon's objective-setting for 2002.[52]

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[49] *Verizon Initial Br*., at 21.

[50] *Verizon Initial Br*., at 21, n.25.

[51] Tr. 341, 5/30/02 (McFeeley).

[52] Tr. 224, 5/29/02 (McFeeley).

III. BECAUSE VERIZON HAS FAILED TO DEMONSTRATE THE EXISTENCE OF COMPETITION OR NON-DISCRIMINATORY PERFORMANCE, VERIZON SHOULD BE SUBJECT TO REPORTING REQUIREMENTS AND PENALTIES.

A. Verizon Demonstrates That Metrics and Standards Measuring Verizon's Intrastate and Interstate Performance Are Necessary to Curb Verizon's Incentive to Discriminate.

Contrary to Verizon's contention, interstate data can and should be "considered evidence on which to base a finding regarding the reasonableness of Verizon MA's provision of intrastate special access circuits."[53] As explained in AT&T's Initial Brief at pages 29-30, the U.S. Supreme Court has recognized the need to consider extra-jurisdictional rates or transactions in order to determine if jurisdictional rates or transactions are discriminatory.[54] The fact that there are minimal intrastate circuits in Massachusetts only further supports the need to monitor Verizon's provisioning and maintenance of interstate circuits to prevent discrimination.[55] Note that almost 100 percent of Verizon's non-access special service circuits are intrastate and almost 100 percent of the special access circuits Verizon provisions to wholesale carrier customers are interstate.[56] Reporting of Verizon's Interstate performance to wholesale carrier customers is necessary to see discrimination by Verizon in favor of its retail customers served over intrastate circuits.

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[53] *Verizon Initial Br.*, at 10.

[54] *See Federal Power Corp*. v. *Conway Corp*., 426 U.S. 271, 277 (1976).

[55] Verizon's claim that WorldCom and AT&T have engaged in a "massive fishing expedition" and a "abuse of regulatory process" in this proceeding is outrageous rhetoric that does not even deserve the respect of a response.

[56] DTE-VZ 2-1 (Bisognano).

Verizon argues that should the Department require Verizon to report its special access performance, the reporting requirement should apply to all carriers.[57] However, it is not necessary to require reporting by carriers that do not have market power. This is exactly what Verizon argues in support of its claim that Verizon should not be subject to mandated reporting.[58] Verizon claims that metrics are unnecessary for carriers subject to the full brunt of competition (*i.e.*, carriers without market power) because competition will discipline performance. Verizon states that metrics are necessary only if a carrier has market power and competition cannot ensure adequate performance. The Department in Phase I of D.T.E. 01-31 found that Verizon is a dominant provider of special access.[59] The data in this proceeding confirms that finding. Therefore, Verizon, as the only carrier with market power, should be required to report its special access performance.

B. Carrier Specific Reports, Verizon Internal Reporting, and "Demands of Highly Sophisticated Customers" Do Not Discipline Verizon's Wholesale Performance.

Verizon claims that mandatory reporting is unnecessary because Verizon provides reports to carriers, because Verizon has its own internal reports, and because sophisticated customers "make their quality expectations known to Verizon."[60] These words, unsupported by any evidence that these factors actually improve Verizon's performance to wholesale carrier customers, should be taken for what they are – empty words. Obviously, if these "voluntary reports" alone were adequate leverage to drive high quality performance for wholesale

[57] *Verizon Initial Br.*, at 65.

[58] *Verizon Initial Br.*, at 11.

[59] *D.T.E. 01-31 Phase I Order*, at 62.

[60] *Verizon Initial Br.*, at 21.

customers, at parity with Verizon retail, AT&T and other parties to this proceeding would not be spending considerable regulatory resources to obtain adequate reporting and nondiscriminatory performance. Verizon never provides any data to show that these reports actually discipline Verizon's performance. Without such hard data, the mere existence of carrier specific and internal measures and sophisticated customers, does not destroy Verizon's incentive to offer poor performance to wholesale carrier customers. Given the continuing disparity between wholesale and retail, the reports Verizon currently provides obviously are not adequate to ensure quality service.

Similarly, Verizon states that it may "conduct a root-cause analysis in certain cases to address particular service-related issues when necessary."[61] First, Verizon cites to no record evidence of this fact. Second, Verizon offers no explanation of when such root-cause analyses are performed or the data results of such analysis. Third, there is no current incentive for Verizon to act on and correct the defects that are at root cause for its service defects (for example, install additional local loop plant, hire and/or train additional personnel). Verizon's reliance on a simple statement that it *may* perform a root cause analysis when it deems it necessary should give the Department no comfort that Verizon will remedy discriminatory results.

C. Verizon's Criticisms of the New York Metrics Are Unwarranted and Irrelevant.

AT&T proposes that the Department institute the following special access metrics and standards adopted in New York in order to monitor Verizon's service quality and to remedy Verizon's discrimination:

[61] *Verizon Initial Br.*, at 27.

SS-OR-1 Percent On Time ASR Response;
SS-PR-1 Provisioning On Time Performance – Met Commitments;
SS-PR-2 Average Delay Days On Missed Installation Orders;
SS-PR-3 Installation Quality;
SS-PR-4 Percent Missed Appointments Due to a Lack of Facilities;
SS-PR-5 % Jeopardies;
SS-MR-1 Customer Trouble Report Rate;
SS-MR-2 Trouble Duration Intervals; and
Provision and updates of the list of standard minimum intervals.

Contrary to Verizon's mischaracterization,[62] AT&T recommends the complete adoption of these metrics with only the one modification to the Percent On-Time ASR Response metric illustrated on Attachment 3 to AT&T's Initial Brief. In this proposed modification, AT&T recommends the elimination of the estimated completion date where no facilities are available because the evidence in this proceeding has shown that lack of facilities does not affect Verizon's on-time performance.[63] Verizon provides the Department with no explanation for not adopting AT&T's proposed modification, stating only that "there is no rational basis for making this change."[64] AT&T's proposal, however, is supported by record evidence.

Verizon claims that certain NYPSC metrics should not be adopted because they are "inherently flawed and not a reliable indicator of special access performance."[65] As can be seen by the examples Verizon sets forth in its initial brief, Verizon's primary problem with the New York metrics is that they do not correspond to Verizon's internal measurements, or lack

[62] *Verizon Initial Br*., at 56-57.

[63] *See* Ex. ATT-8 (Comparison of on-time percentage: facilities builds included v. facilities builds omitted).

[64] *Verizon Initial Br*., at 58.

[65] *Verizon Initial Br.*, at 59.

thereof.[66] There is no evidence that Verizon's internal measures have been validated and, in any event, they are not effective in assuring high quality service that meets wholesale customers expectations and preventing discrimination by Verizon. There is no reason, therefore, to assume that special access metrics adopted by the Department must mirror Verizon's internal reporting measures.

Specifically, Verizon states that the NYPSC metric for Average Delay Days for Missed Installation Orders (SS-PR-2) is "useless" because it only shows average delay days for Verizon reasons and does not report the average delay days for customer reasons.[67] However, this metric intentionally and appropriately focuses only on orders that Verizon missed for Verizon reasons.[68] Inclusion of misses due to CNR are not necessary. Requiring Verizon to report the orders missed solely for Verizon reasons measures the performance of the monopoly provider, Verizon, in order to give Verizon appropriate incentives to provide good quality service. Individual customers have no market power and do not need their "performance" measured. Certainly, contrary to Verizon's claim, exclusion of CNR misses does not invalidate or require the elimination of the metric as it currently stands.

Consistent with its internal reporting on performance to wholesale carrier customers, Verizon proposes that the following metrics exclude trouble reports classified as "test OK" and "no trouble found:" Installation Quality (SS-PR-3); Customer Trouble Report Rate (SS-MR-1);

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[66] Tr. 198-199, 5/29/02 (Holland) (no internal standard for FOC receipts past due; no internal standard for offered versus requested due date); Tr. 231-232, 5/29/02 (Holland) (no internal standard or tracking of jeopardy notifications; no internal standards for the application to the completion data other than the minimum tariffed intervals of 9 and 20 days).

[67] *Verizon Initial Br*., at 60.

[68] *See* ATT-1, *Halloran Direct*, Attachment B (attached NY Metrics, Appendix 3, page 16).

and Trouble Duration (SS-MR-2). Verizon claims that these metrics are "deficient" because they include the "test OK" and "no trouble found" trouble reports. First, Verizon's internal wholesale measures and its proposed revision to the NY metrics are inconsistent with Verizon's retail reporting practices. Verizon includes in its retail measurement of the new circuit failure rate the "test OK" and "no trouble found" categories of trouble reports.[69] Second, these categories of trouble reports are readily identifiable and can be included or excluded very easily, as demonstrated by the fact that Verizon includes them in its retail reports and excludes them from its wholesale reports. Thus, the NY metrics listed by Verizon can be modified to require reporting that includes and excludes "test OK" and "no trouble found." Certainly, the metrics do not need to be eliminated in order to address Verizon's unsupported allegation that these categories of troubles "unjustly distorts Verizon's performance results."[70]

D. By Instituting Financial Penalties, the Department Will Provide Verizon With the Incentive to Offer Quality Service to Wholesale Carrier Customers.

Recognizing that Verizon has the incentive to discriminate in its provisioning of special access circuits, the Department opened this docket in order to investigate allegations of unreasonable provisioning of special access services.[71] The Department specifically stated in the D.T.E. 01-31 Phase I Order:

> If [this] investigation should reveal that Verizon is providing unreasonable provisioning of intrastate wholesale special access services to CLECs, the Department has the means to remedy any such substandard performance by instituting a penalty mechanism similar to the PAP to give incentives for Verizon to improve its service, among other things. Accordingly, given the remedies at its

[69] Tr. 276, 5/29/02 (Holland).

[70] *Verizon Initial Br.*, at 61.

[71] *D.T.E. 01-31 Phase I Order*, at 64.

> disposal, the Department determines that wholesale provisioning problems do not constitute a non-price barrier to entry.[72]

Thus, the Department recognized that it has the authority to penalize Verizon for poor intrastate performance.

Without any citation to legal support and in complete contradiction of the Department's D.T.E. 01-31 Order, Verizon claims that the Department "lacks authority to impose a self-effectuating enforcement mechanism involving automatic payment of liquidated damages to competitors."[73] The Department has already ordered Verizon to make payments to competitors, both in the *Consolidated Arbitrations* and in the PAP in D.T.E. 99-271, and has made known in D.T.E. 01-31 its ability to institute penalties as a result of a finding of discrimination in this proceeding.[74] Moreover, the Department has adopted a service quality plan with financial penalties for retail service in D.P.U. 94-50 and is planning to do so again in D.T.E. 01-31. Even if there were an argument that the Department cannot order penalties to competitors (an argument that Verizon has not even attempted because there is not one), there is nothing to prevent the Department from ordering such penalties to be paid to the state. AT&T seeks incentives for good performance from Verizon; it is not looking for revenues from penalty payments.

[72] *D.T.E. 01-31 Phase I Order*, at 65.

[73] *Verizon Initial Br.*, at 67.

[74] *D.T.E. 01-31 Phase I Order*, at 65.

E. Either In Phase II of This Proceeding or in Phase II of D.T.E. 01-31, the Department Should Address the Issue of Removing Verizon's UNE Restrictions in Order to Cure the Special Access Problems Identified in This Docket and to Promote Full and Efficient Competition in The Retail Market.

In its initial brief, Verizon takes issue with Ms. Halloran's recommendation to cure Verizon's special access performance problem by requiring Verizon to remove its use restrictions that prevent the use of the loop and interoffice transport facilities (which make up the special access circuits) to provide bundled local and long distance traffic.[75] Verizon offers no public policy or economic rationale to defend its use restrictions, conceding by its silence that there is none. The only defense that Verizon offers is that, because the FCC permits Verizon to impose those restrictions, so too should the Department. More precisely, Verizon argues that the Department cannot require it to provide unbundled loop and transport facilities as UNEs for purposes of carrying bundled local and long distance traffic in the absence of one of the FCC's three "safe harbor" certifications because the Department cannot impose such an order under the authority of the Telecommunications Act of 1996 ("1996 Act"). According to Verizon, the FCC alone can define the requirements of the Telecommunications Act. As explained below, Verizon's reliance on the FCC rules is misplaced.

1. The Department Has Authority Under State Law to Define Loop and Interoffice Network Elements in a Way That Permits Them to Be Used to Provide Bundled Local and Long Distance Service.

Even if Verizon were correct that the FCC alone can and has properly defined ILEC obligations under the 1996 Act (a legal conclusion that AT&T does not concede), Verizon's argument is beside the point. Apart from its authority under the 1996 Act, the Department can act pursuant to its authority under state law to create unbundled network elements, so long as

[75] *Verizon Initial Br.*, at 54, (citing Ex. ATT-1, *Halloran Direct*, at 14-16.)

such action does not interfere with the objectives of the 1996 Act to further competition in the local exchange market.

The Department has broad authority under G.L. c. 159 to regulate the manner in which Verizon operates its network.[76] The Department has previously found that it has the power to investigate the unbundling of and interconnection with Verizon's network elements.[77]

Congress has specifically provided that the Department may exercise its authority under state law to impose additional requirements upon Verizon, so long as those requirements are "not inconsistent" with any federal rules.[78] Thus, "the language of the 1996 Act compels the conclusion that Congress did not intend to occupy the field of telecommunications regulation, and that it took explicit steps to maintain the authority of state regulatory bodies to enforce and work within the Act."[79] Under these circumstances, federal regulations established by the FCC only set the floor for unbundling and access requirements.[80] There is no conflict between state and federal law, and thus no preemption, when it is possible to comply with both sets of regulations.[81]

This principle was recently confirmed by the Vermont Supreme Court, which affirmed an order by the Vermont Public Service Board requiring Verizon to offer CLECs combinations of

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[76] *See, e.g.,* D.P.U. 94-50 at 116; D.P.U. 89-20 at 17; *see also* D.T.E. 01-34, *Vote and Order to Open Investigation* at 2-3 (March 14, 2001).

[77] *See* D.P.U. 94-185, *Vote to Open Investigation* at 3-5 (Jan. 6, 1995).

[78] 47 U.S.C. § 261(c); s*ee also* § 251(d)(3), 252(e)(3).

[79] *Petition of Verizon New England, Inc.*, 795 A.2d, 1196, 1200 (Vt. 2002).

[80] *See, e.g., Goodrow* v. *Lane Bryant, Inc.*, 432 Mass. 165, 170-171 (2000).

[81] *See, e.g., Arthur D. Little, Inc.* v. *Comm'r of Health and Hospitals of Cambridge*, 395 Mass. 535, 550 (1985).

UNEs that were ordinarily combined and to resell voice mail as a telecommunications service.[82] Significantly, the Court stressed that the Board's order would be lawful even if "federal law does not require such combinations" of UNEs.[83] Because nothing in federal statutory or regulatory provisions *prohibits* an ILEC from offering the type of combined UNEs at issue, no conflict between federal and state law could exist.[84] As the Court explained, "the federal scheme does not outline any limitations on state authority to regulate above and beyond the minimum requirements of the Act."[85] So long as Verizon is capable of complying with state and federal requirements simultaneously, state regulations are valid and not preempted by federal law.[86]

The Department's prerogatives are just as broad as those of the Vermont Board. Here, there is no question that Department action requiring Verizon to provide unbundled loops and interoffice transport facilities to CLECs in accordance with a local usage test that can be satisfied more easily than that prescribed by the FCC is not inconsistent with federal law. The FCC's *Supplemental Remand Order* and *Supplemental Order Clarification* upon which Verizon relies[87] does not ***require*** Verizon to impose the use restrictions reflected in the three "Safe Harbor" certifications. It merely ***permits*** an ILEC to do so. Thus, Verizon may remove its use

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[82] *See Petition of Verizon New England*, 795 A.2d at 1204, 1207-08.

[83] *Id*. at 1204.

[84] *Id*.

[85] *Id*. at 1204.

[86] *Id*. at 1204-1205.

[87] *Verizon Initial Br.*, at 55 (citing *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order, FCC 99-370, CC Docket No. 96-98 (Nov. 24, 1999) ("*Supplemental Remand Order*") and Supplemental Order Clarification, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 00-183 (June 7, 2000) ("*Supplemental Order Clarification*")).

restrictions on combined loops and UNEs without violating a federal law. A Department order requiring Verizon to do so, therefore, would not be inconsistent with federal law.

2. If the Department Does Not Order Verizon to Remove Its Use Restrictions Immediately, the Department Should Determine, in Phase II of Either This Proceeding or D.T.E. 01-31, What Type Of Use Restrictions Can – Unlike The Present Ones – Be Satisfied From a Technical Point of View.

Only when Verizon's competitors are able to use the network in the same way as Verizon does to serve its local customers – free of artificial regulatory restrictions on usage – will there be real competition in local exchange markets. AT&T believes, therefore, that the Department can and should immediately order Verizon to remove its use restrictions and adopt the specific tariff language recommended by Ms. Halloran.[88] However, if, contrary to AT&T's recommendation, the Department were to decide that some type of UNE use restrictions should remain in place, Phase II should include the consideration of UNE use restrictions that can – unlike the present use restrictions – be satisfied from a technical point of view.[89]

In such an investigation, the Department could take advantage of the considerable effort that the NYPSC has already devoted to this issue. In New York, although the NYPSC established restrictions on the use of EELs intended to ensure that they are used "to transmit

[88] *See* ATT-1, Halloran Direct, at 15-16.

[89] As Ms. Waldbaum explained in her testimony in D.T.E. 01-31, Verizon's current UNE use restrictions have the practical effect of prohibiting the use of UNEs in all instances involving private line services, because none of the three "safe harbor" options can be satisfied. They cannot be satisfied because, under the first option, CLECs must require customers to enter into exclusive contracts (which is commercially untenable) and, under the second two options, CLECs must measure usage at the customer premises, where no measurement facilities exist. *See*, Exh. ATT-3 (August 24, 2001 Waldbaum Testimony), at 8-11, in D.T.E. 01-31. Ms. Walbaum's testimony was never challenged by Verizon in D.T.E. 01-31.

primarily local exchange traffic," it established a test that can be satisfied as a practical and administrative matter.[90] The NYPSC stated:

> In order to qualify for the EEL rate, a rate more favorable than the special access rate, the March 24 Order requires that EELs at and above the DS1 or T-1 level must be used to transmit primarily local exchange traffic. The primarily local standard will consist of a channel count test at the transport and loop level. When some local traffic is carried on 50% or more of DS1 level and above loop channels that are connected to a transport facility, the transport will qualify for EEL rates as will the loops, to the extent loops service customers whose local needs are being satisfied by the EEL circuit. If the primarily local standard for transport is not met, then the EEL rates would apply only to those loops meeting the standard; i.e. for loops of DS1 level and above, some local traffic must be carried on 50% of the channels on the loop circuit.[91]

Thus defined, the New York local usage definition is simple and implementable. It requires some local traffic on 50% or more of DS1 loop channels, but it does not require that the CLEC or the customer measure the quantity of such usage. This test can be satisfied in many cases because carriers such as AT&T do not segregate T1.5 channels. Hence, if the customer is purchasing local service from AT&T on this circuit, all of the channels will have some local traffic.

In summary, the Department has the authority to act on Ms. Halloran's recommendation that Verizon's special access problem be cured by requiring Verizon to provide to telecommunications carriers as UNEs the loop and interoffice facilities that make up special access. At a minimum, the Department should institute an investigation into use restrictions that will permit Verizon's competitors to obtain as UNEs loop and interoffice facilities in accordance with use limitations that do not preclude UNE use altogether when offering bundled local and

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[90] *Order Denying Rehearing and Clarifying Primarily Local Traffic Standard* (issued and effective August 10, 1999) ("Primarily Local Traffic Standard Order"), at 11.

[91] *Id*.

long distance service.

3. Either in Phase II of This Proceeding or in Phase II of D.T.E. 01-31, the Department Should Investigate Verizon's "No Facilities" Barrier to CLEC Usage of UNEs.

As explained in AT&T's Initial Brief at pages 38-40, Verizon's unilateral, overbroad definition of "facilities not available" prevents CLECs from using UNEs and, therefore forces CLECs to rely on special access circuits which Verizon provisions at higher cost and poorer performance than UNEs. As with removal of UNE use restrictions, elimination of Verizon's "no facilities" policy will prevent Verizon from obstructing competition in the Massachusetts special access market. AT&T therefore requests that the Department investigate the Verizon "no facilities" policy in Phase II of this proceeding or in Phase II of D.T.E. 01-31.

CONCLUSION.

If the Department seeks efficient retail competition, it cannot allow Verizon, as the vertically integrated supplier of special access and the dominant carrier in the special access market, to continue to act in accord with its incentive to discriminate. Institution of the NYPSC intrastate and interstate special access standards and metrics and establishment of a PAP which includes substantial financial penalties will lessen Verizon's incentive to discriminate. AT&T respectfully requests that the Department institute these measures, as well as commence an expedited Phase II of this proceeding to determine specific penalty amounts and to conduct a root cause analysis of Verizon's special access service quality. Finally, the Department should address the issue of UNE use restrictions as a means of reducing CLEC's reliance on Verizon's discriminatory provisioning and maintenance of special access circuits.

Respectfully submitted,

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